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October 18, 2007 70008.00002

VIA ECF AND UPS OVERNIGHT

Hon. A. Kathleen Tomlinson
United States Magistrate Judge
United States District Court, Eastern District of New York
100 Federal Plaza, P.O. Box 9014
Central Islip, NY 11722-9014

Re: *FragranceNet.com, Inc. v. FragranceX.com, Inc.*, CV-06-2225

Dear Judge Tomlinson:

Plaintiff submits this letter in accordance with the Court's electronic order of October 12, 2007. Defendant's opposition of unauthorized length contains several inaccuracies and misstatements that cannot avoid misleading the court.

1. Defendant used 900 of plaintiff's photographs to advertise its thousands of fragrance products

Defendant somehow would have this Court believe that only 50 infringing photographs are in issue, and not all 900 that correspond to the thousands of products defendant sells.[1] That is not even close to the truth, and defendant knows it. Each of the 900 infringing photographs employed by defendant represents an individual brand (*e.g.*, Oscar perfume, Paloma Picasso perfume) under which defendant offers several different products for sale (the page for Oscar perfume, for example, contains nine products and the page for Paloma Picasso perfume contains seven products -- a total of 16 products based on two infringing photographs). *See* attachments. Thus, defendant has used the infringing photographs in connection with the advertising and sale of thousands of products on its Web site, indeed, the majority of them. We will leave to the Court how to characterize defendant's opposition that makes it appear as though only 50 of nearly 9,000 products are in issue.

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[1] *See* Declaration of Ron Yakuel, dated Oct. 3, 2007 ("Yakuel Decl."), ¶ 7, annexed to defendant's opposition to plaintiff's motion to compel. Naturally, defendant has all 900 infringing photographs, which also will be provided to defendant by plaintiff in the course of discovery.

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Defendant claims that it offered for sale some 8,986 products in March 2005. That number, of course, is inclusive of all of defendant's products, not just fragrances, and includes skin care and make up products as well.[2] The infringing photographs are only for fragrances, which, it is believed, total approximately 5,000 to 5,500 products. Thus, defendant's use of the infringing photographs in connection with thousands upon thousands of fragrance products is a far cry from "a small number of its products."[3]

2. Defendant sends its drop-ship affiliates and others the infringing photographs to use on their own Web sites

In one section of defendant's opposition, defendant implies a lack of participation with third-party Web sites, including the use of the infringing photographs by those Web sites. Nowhere does defendant ever come out and deny such affiliation/participation. We are confident the Court took notice of defendant's failure to do so. Defendant merely attempts to deflect attention from its discovery obligations by arguing that plaintiff has not yet proven that connection and therefore should be deprived of all discovery at this incipient stage of the litigation.

In yet another attempt to downplay the scope of its wrongdoing, defendant describes "drop-shippers" as operating "retail stores."[4] That description is misleading to the extent that most if not all of defendant's drop-shipper affiliates are not brick and mortar stores, but are Web sites that operate in much the same manner as FragranceX and FragranceNet. (Plaintiff has provided a working definition of "drop-shippers" in its letter to the Court dated September 28, 2007.) Additionally, defendant claims that its affiliates merely take orders from their own customers and relay those orders to defendant, which in turn ships the products to consumers.[5] What defendant fails to tell the Court, however, is that defendant sends a data feed of defendant's inventory to the affiliate's Web site, *including product photographs*, pricing information and product descriptions. The affiliate then creates its own site for the sale of fragrances. The data feed transmission occurs on a regular basis (*e.g.*, either several times a day, daily or weekly) to ensure that the affiliate has accurate inventory information.

Determining the identity of defendant's affiliates is necessary in order for plaintiff to name the John Doe defendants in this action.

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2 *Id.*
3 *Id.* at ¶ 8.
4 *Id.* at ¶ 2.
5 *Id.* at ¶ 3.

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3. Defendant's perfume revenues and expenses are necessary to ensure any claimed deductions are accurate

Defendant again attempts to mislead the Court into believing that the number of products with which it has used the infringing photographs is miniscule (only 50) in comparison to its total product catalog. As discussed in point 1, *supra*, the fragrance products with which plaintiff used the infringing photographs constitute almost the entirety of plaintiff's fragrance business.

Somehow, defendant argues that its perfume revenues and expenses are irrelevant. That position is but a thinly veiled attempt to circumvent this Court's order of August 28, 2007 that denied defendant's motion to bifurcate liability and damages discovery. The information is necessary to allow plaintiff to know whether defendant is contriving "deductions" in an effort to reduce its profits. It also will allow plaintiff to ensure that defendant's stated profits, expenses and allocations are in line with those items as they pertain to defendant's overall business and were not specially created for the products in issue. The protective order entered in this action will protect the confidentiality of defendant's financial information.

Plaintiff respectfully requests that this Court compel defendant to produce the documents and things responsive to plaintiff's Request Nos. 1, 2, 7, 10 and 11-16 and to supplement its responses to fully respond to Interrogatory Nos. 1, 2 and 8.

Respectfully submitted,

Robert L. Sherman

Robert L. Sherman
of PAUL, HASTINGS, JANOFSKY & WALKER LLP
Attachments
RLS/lr

cc: David Rabinowitz, Esq. (Via Fax: 212-554-7700)